

**United States Department of Labor
Employees' Compensation Appeals Board**

A.A., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Long Beach, CA, Employer**

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**Docket No. 06-917
Issued: June 22, 2007**

Appearances:

K.A., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 13, 2006 appellant filed a timely appeal from a decision of a hearing representative of the Office of Workers' Compensation Programs dated February 15, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly suspended appellant's right to compensation benefits on the grounds that he refused to submit to a medical examination.

FACTUAL HISTORY

This case has been before the Board on prior occasions. By decision dated April 22, 1997, the Board affirmed decisions dated November 13, 1995 and May 31, 1996, in which the

Office terminated appellant's compensation benefits.¹ The Board found that the well-reasoned opinion of Dr. Richard G. Ness, a Board-certified psychiatrist of professorial status who served as an impartial examiner, constituted the weight of medical opinion. Dr. Ness opined that appellant's employment-related emotional condition had ceased. The Board further found that appellant's employment-related physical disabilities had resolved. In a September 6, 2001 decision, the Board found that a conflict in medical opinion had been created between the opinions of Dr. Ness and Dr. Allen J. Enelow, who is Board-certified in psychiatry, regarding whether appellant's disability after November 12, 1995 was employment related. The case was remanded to the Office for referral to an appropriate Board-certified specialist to resolve the conflict.² In an order dated August 18, 2003, the Board remanded the case to the Office on the grounds that a review of the credentials of the physician selected as an impartial medical specialist, Dr. Howard Greils, did not show that he was Board-certified or that he possessed any special qualifications in the field of psychiatry.³ The law and the facts as set forth in the previous Board decisions and orders are incorporated herein by reference.

On October 24, 2003 the Office reinstated appellant's wage-loss compensation retroactive to November 13, 1995, based on a September 20, 2002 report of Dr. Robert S. Martin, a Board-certified psychiatrist. Appellant received appropriate compensation and was returned to the periodic rolls. On September 21, 2004 he was referred to a nurse to assist in coordinating the medical aspects of his care. On October 4, 2004 Dr. Martin was authorized as the attending physician. In nursing logs covering the period September 27 to October 7, 2004, the Office nurse documented her telephone conversations with appellant's wife, who is his representative, and noted that she was unable to speak with appellant.

On October 30, 2004 appellant's representative requested a change in physicians to Dr. William Bondareff, a Board-certified psychiatrist, because Dr. Martin had retired. In a November 15, 2004 letter, she stated that appellant could not cooperate with the assigned nurse because he was still totally disabled. Counsel submitted a work capacity evaluation dated November 4, 2004 in which Dr. Martin advised that he had not seen appellant since September 12, 2002 when he was found totally disabled due to depression, low energy, poor sleep and poor concentration. Dr. Martin advised that appellant could return to work after psychiatric treatment.

In letters dated November 15 and 17, 2004, QTC Medical Services, an Office contract company, advised appellant that appointments were scheduled for him on December 9, 2004 with Gale J. Taucher-Schuler, Ph.D. at 1:00 p.m., and Dr. Reynaldo B. Abejuela, a psychiatrist, at 3:00 p.m. The letters were mailed to appellant's address of record and copies were mailed to his representative. Appellant was informed of his responsibility to attend the appointment and that, if he failed to do so without an acceptable reason, his compensation benefits could be

¹ Docket No. 96-2071 (issued April 22, 1997).

² Docket No. 00-704 (issued September 6, 2001).

³ 54 ECAB 771 (2003). The Board also notes that in orders dated April 16, 1999, Docket No. 99-1122, and July 9, 2001, Docket No. 00-237, the Board dismissed appellant's appeals at his request.

suspended under section 8123(d) of the Federal Employees' Compensation Act.⁴ On December 3, 2004 the Office authorized treatment with Dr. Bondareff.

The Office was informed that appellant did not attend the scheduled appointments. In a notice dated December 10, 2004, the Office proposed to suspend his compensation benefits on the grounds that he failed to appear for either examination scheduled for December 9, 2004. The Office allowed appellant 14 days to provide in writing good cause for his failure to appear and informed him of the penalty provision of section 8123(d) of the Act. The appointments with Drs. Abejuela and Taucher-Schuler were rescheduled for January 3, 2005 at 2:45 and 3:45 p.m., respectively. By letter dated December 20, 2004, appellant's representative stated that appellant did not attend the scheduled December 9, 2004 appointments because he did not receive any letters from the Office and merely received postcards notifying him of the scheduled appointments. She also stated that appellant was ill with the flu and requested that appointments be scheduled between 9:00 a.m. and 12:00 noon because appellant depended on her for transportation. On December 31, 2004 appellant requested that appointments be scheduled between 9:00 a.m. and 12:00 noon. He did not attend the scheduled January 3, 2005 appointments.

By decision dated December 30, 2004, the Office finalized the proposed suspension but rescinded this decision on January 7, 2005.

On January 7, 2005 the Office proposed to suspend appellant's compensation benefits on the grounds that he failed to appear for the examinations scheduled for January 3, 2005. The Office again allowed appellant 14 days to provide in writing good cause for his failure to appear and informed him of the penalty provision of section 8123(d) of the Act.

By decision dated January 10, 2005, the Office suspended appellant's compensation benefits pursuant to section 8104(a) of the Act, directing a permanently disabled employee to undergo vocational rehabilitation,⁵ based on his failure to cooperate with the Office nurse.

Appellant was rescheduled for appointments with Drs. Abejuela and Taucher-Schuler on February 1, 2005 at 10:20 a.m. and 11:20 a.m., respectively. By letter dated January 20, 2005, appellant's representative objected to the January 7, 2005 proposed suspension, stating that they had a transportation problem "beyond our control." She also argued that the scheduled examinations were unreasonable and that the Office abused its discretion in scheduling them because there was no medical basis to justify the examinations. Appellant did not keep the scheduled February 1, 2005 appointments.

By decision dated February 3, 2005, the Office finalized the suspension of appellant's compensation benefits effective January 3, 2005 on the grounds that he did not attend scheduled physical examinations scheduled that day.

⁴ 5 U.S.C. § 8123(d).

⁵ 5 U.S.C. § 8104(a).

On February 23, 2005 appellant, through his representative, requested a review of the written record regarding the February 3, 2005 decision. She again contended that it was unreasonable for the Office to schedule the examinations and further argued that the employers of Drs. Taucher-Schuler and Abejuela, QTC and Baybrook, submitted biased reports. Counsel submitted exhibits in support of her contentions and copies of a hearing request and pleading regarding the January 10, 2005 decision suspending appellant's compensation benefits for his failure to participate in vocational rehabilitation.

In a May 9, 2005 decision, an Office hearing representative vacated the February 3, 2005 decision, stating that appellant should be given the right to explain why he did not attend the scheduled examinations. By decision dated June 20, 2005, an Office hearing representative reversed the January 10, 2005 decision regarding appellant's failure to participate in vocational rehabilitation. Appellant's compensation benefits were to be reinstated and the Office was to refer appellant for a reasoned medical opinion concerning his ability to participate in vocational rehabilitation.

By letter dated July 13, 2005, the Office informed appellant that he would receive compensation for the period December 26, 2004 through January 31, 2005. Also on July 13, 2005, the Office proposed to suspend appellant's compensation benefits on the grounds that he failed to appear for the examinations scheduled for February 1, 2005. The Office allowed appellant 14 days to provide in writing good cause for his failure to appear and informed him of the penalty provision of section 8123(d) of the Act.

On July 24, 2005 appellant's representative disagreed with the suspension of benefits arguing that it was in conflict with the June 20, 2005 decision of an Office hearing representative who found that appellant's compensation benefits should be reinstated. She further stated that it was unreasonable for the Office to schedule the examination on February 1, 2005, that she was ill with the flu and could not drive appellant to the scheduled examinations, that the accepted conditions and statement of accepted facts were incorrect and misleading and that the Office did not provide her with a list of questions provided to the second-opinion examiners as requested or explain why the examination was needed. Counsel also contended that she was not provided with proper notice of the appointments and that there was a potential conflict of interest because QTC also scheduled appointments for the employing establishment.

By decision dated August 26, 2005, the Office determined that the reasons furnished by appellant were insufficient and finalized the proposed termination.

On September 24, 2005 appellant, through his representative, requested a review of the written record. She reiterated her previous reasons for appellant's failing to attend the scheduled examinations. Counsel also submitted an affidavit dated September 24, 2005 in which she attested that she was ill with the flu on February 1, 2005 and could not drive appellant to the scheduled examination and that public transportation was not available. In an affidavit dated September 24, 2005, Nikki Kessler, a friend of appellant, attested that she witnessed that appellant's representative was sick on January 31, 2005 and that she had to refuse her request that she take appellant to the scheduled examination because she had a prior commitment.

In a February 15, 2006 decision, an Office hearing representative found the reasons for not attending the examination proffered by appellant's representative were insufficient and affirmed the August 26, 2005 decision as modified to reflect that appellant was entitled to compensation benefits through July 27, 2005.

LEGAL PRECEDENT

Section 8123 of the Act authorizes the Office to require an employee, who claims disability as a result of federal employment, to undergo a physical examination as it deems necessary.⁶ The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office.⁷ The Office's federal regulation at section 10.320 provides that a claimant must submit to examination by a qualified physician as often and at such time and places as the Office considers reasonably necessary.⁸ Section 8123(d) of the Act and section 10.323 of the Office's regulation provides that, if an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction ceases.⁹ Office procedures provide that before the Office may invoke these provisions, the employee is to be provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.¹⁰ If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of the Act.¹¹

ANALYSIS

In this case, the Office scheduled second opinion examinations on December 9, 2004, January 3 and February 1, 2005. Appellant did not appear for any of the scheduled examinations. His representative argued that it was unreasonable for the Office to schedule these examinations because there was no medical justification. The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office. The only limitation on the Office's authority, with regard to instructing a claimant to undergo a medical examination, is that of reasonableness.¹² The Board has interpreted the "plain meaning" of section 8123(d) to provide that compensation is not payable while a refusal or obstruction of an examination continues.¹³

⁶ 5 U.S.C. § 8123.

⁷ See *Lynn C. Huber*, 54 ECAB 281 (2002); *Donald E. Ewals*, 51 ECAB 428 (2000).

⁸ 20 C.F.R. § 10.320.

⁹ 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323; see *Alfred R. Anderson*, 54 ECAB 179 (2002).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (July 2000).

¹¹ *Id.*

¹² *Lynn C. Huber*, *supra* note 7.

¹³ *Alfred R. Anderson*, *supra* note 9.

The most recent medical report of record is the November 4, 2004 work capacity evaluation in which Dr. Martin advised that he, in turn, had not seen appellant since September 12, 2002. When appellant's representative informed the Office that Dr. Martin had retired and requested authorization for treatment with Dr. Bondareff, by letter dated December 3, 2004, the Office complied. There is no indication in the record that appellant was ever treated by Dr. Bondareff or seen by any other physician after September 12, 2002.¹⁴ It was therefore reasonable for the Office to schedule second opinion evaluations beginning in December 2004.¹⁵

Appellant's representative argued that appellant or she had the flu on the dates of the scheduled examinations. His compensation benefits, however, were not suspended until July 27, 2005. The last scheduled medical appointment was February 1, 2005. Ms. Kessler's affidavit affirms that appellant's representative was sick on January 31, 2005, but there is nothing in the record to show that she tried to reschedule the appointments. Furthermore, she did not attempt to reschedule the evaluations at any time after February 1, 2005. The Board finds the contention that appellant lacked transportation because his representative was sick insufficient. Appellant's representative had requested that the medical appointments be scheduled between 9:00 a.m. and noon, and the February 1, 2005 examinations were scheduled for 10:20 and 11:20 a.m. She could have secured another mode of transportation for appellant.¹⁶ The Board finds that her arguments do not establish good cause for appellant's failure to appear.¹⁷

Appellant's representative also contended that he was not given proper notice as the Office did not issue a proposed suspension until July 13, 2005. This argument is without merit as the Office carefully weighed appellant's arguments regarding his failure to appear for the scheduled examinations and found them insufficient to establish good cause. The Office hearing representative modified the August 26, 2005 decision to reflect that appellant should receive compensation benefits through July 27, 2005. Finally, appellant asserted that the Office denied him due process. The Supreme Court has held that constitutional questions are unsuited to resolution in administrative hearing procedures. As the Board is an administrative body, it does not have jurisdiction to review a constitutional claim such as that made by appellant. The federal courts retain jurisdiction over decisions under the Act where there is a charge of a violation of a clear statutory mandate or where there is a constitutional claim. The Board lacked jurisdiction to review the merits of this argument.¹⁸

Appellant also raised general arguments concerning the appropriateness of the scheduling by QTC. The Office properly notified appellant of his rights and responsibilities with respect to the medical examination scheduled by QTC, a company under contract with the Office to schedule medical examinations. In this case, QTC acted as the Office's agent, advised appellant

¹⁴ The Board notes that the record contains a report apparently listing a medication regimen. It is not signed by a physician and there is no indication that it is for appellant.

¹⁵ *Lynn C. Huber*, *supra* note 7.

¹⁶ See *Laura K. Correa*, 49 ECAB 599 (1998).

¹⁷ See *Maura D. Fuller (Judson H. Fuller)*, 54 ECAB 386 (2003).

¹⁸ *R.G.*, 58 ECAB ____ (Docket No. 06-369, issued December 13, 2006).

by letter of the scheduled appointment and notified the Office that appellant did not keep his appointment. Appellant did not establish good cause for his failure to report to the scheduled appointment. He did not follow the instructions given to him by QTC for rescheduling or missing an examination. As appellant did not appear for the examination and did not provide good cause, the Office properly suspended his right to compensation benefits.¹⁹

In accordance with 20 C.F.R. § 10.323, the actions of an employee's representative will be considered the actions of the employee for the purpose of determining whether a claimant refused to submit to, or in any way obstructed, an examination required by the Office.²⁰ The Office referred appellant for second opinion evaluations on three occasions. The Office advised appellant and his representative of the need for the examination, his obligation to attend, and the time and place for the scheduled appointments. Appellant did not attend and the Office allowed him 14 days to provide reasons for failing to appear. The only limitation on the Office's authority is that of reasonableness. Appellant's referral of an appropriate specialist for a current medical examination at Office expense was not unreasonable. He did not provide adequate reasons for not complying and thus did not establish good cause for refusing to undergo the directed examination. The Office properly suspended his compensation benefits.²¹

CONCLUSION

The Board finds that the Office properly suspended appellant's right to compensation benefits beginning July 28, 2005 as he refused to attend a scheduled medical evaluation.

¹⁹ *S.B.*, 58 ECAB __ (Docket No. 06-1838, issued January 11, 2007).

²⁰ 20 C.F.R. § 10.323; *Maura D. Fuller*, *supra* note 17.

²¹ 5 U.S.C. § 8123; *Scott R. Walsh*, 56 ECAB __ (Docket No. 04-1962, issued February 18, 2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 15, 2006 be affirmed.

Issued: June 22, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board